(3)

Supreme Court, U.S.
FILED
APR 15 2005
OFFICE OF THE CLERK

No. 04-1094

In the Supreme Court of the United States

CECILIO NUNEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL RESPONSE FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

ELIZABETH A. OLSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Eleventh Circuit abuses its discretion by applying a longstanding procedural bar rule to decline to consider claims of error under the Sixth Amendment or *United States* v. *Booker*, 125 S. Ct. 738 (2005), in cases in which that argument is not raised in the appellant's opening brief.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 5
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Adams-Arapahoe Joint Sch. Dist. No. 28-J v. *Continental Ins. Co.*, 891 F.2d 772 (10th Cir. 1989) 10
Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 8, 11
Ardley v. *United States*, 535 U.S. 979 (2002) 15
Bickel v. *Korean Air Lines Co.*, 96 F.3d 151 (6th Cir. 1996), cert. denied, 519 U.S. 1093 (1997) 9
Blakely v. *Washington*, 125 S. Ct. 2531 (2004) 2
Cupp v. *Naughten*, 414 U.S. 141 (1973) 13
Edwards v. *Arizona*, 451 U.S. 477 (1981) 7
Garcia v. *United States*, 534 U.S. 823 (2001) 15
Ghana v. *Holland*, 226 F.3d 175 (3d Cir. 2000) 9
Gramegna v. *Johnson*, 846 F.2d 675 (11th Cir. 1988) 11
Greenwood v. *FAA*, 28 F.3d 971 (9th Cir. 1994) 10
Griffith v. *Kentucky*, 479 U.S. 314 (1987) 5, 6, 8

Cases—Continued: Page

Harper v. *Virginia Dep't of Taxation*, 509 U.S. 86 (1993) 8
Holman v. *Indiana*, 211 F.3d 399 (7th Cir.), cert. denied, 531 U.S. 880 (2000) 9
Johnson v. *United States*, 520 U.S. 461 (1997) 8, 14
Kost v. *Kozakiewicz*, 1 F.3d 176 (3d Cir. 1993) 9
Leer v. *Murphy*, 844 F.2d 628 (9th Cir. 1988) 10
Maryland People's Counsel v. *FERC*, 760 F.2d 318 (D.C. Cir. 1985) 10
McGinnis v. *Ingram Equip. Co.*, 918 F.2d 1491 (11th Cir. 1990) 11
Nealy v. *United States*, 534 U.S. 1023 (2001) 15
Ortega-Rodriguez v. *United States*, 507 U.S. 234 (1993) 13
Padilla-Reyes v. *United States*, 534 U.S. 913 (2001) 15
Phillips v. *United States*, 536 U.S. 961 (2002) 15
Playboy Enters. v. *Public Serv. Comm'n*, 906 F.2d 25 (1st Cir.), cert. denied, 498 U.S. 959 (1990) 9
Priddy v. *Edelman*, 883 F.2d 438 (6th Cir. 1989) 9
Schriro v. *Summerlin*, 124 S. Ct. 2519 (2004) 5
Senn v. *United States*, 125 S. Ct. 1397 (2005) 4
Shea v. *Louisiana*, 470 U.S. 51 (1985) 6
Shopco Distrib. Co. v. *Commanding Gen. of Marine Corps Base*, 885 F.2d 167 (4th Cir. 1989) 9

Cases—Continued: Page

Sweat v. *City of Ft. Smith*, 265 F.3d 692 (8th Cir. 2001) 10
Thomas v. *Arn*, 474 U.S. 140 (1985) 13
Thompson v. *United States*, 535 U.S. 1114 (2002) 15
United States v. *Ameline*, 376 F.3d 967 (9th Cir. 2004), on reh'g, 400 F.3d 646 (9th Cir), reh'g en banc granted, 2005 WL 61270 (9th Cir. Mar. 11, 2005) 12
United States v. *Ardley*:
242 F.3d 989 (11th Cir.), cert. denied, 533 U.S. 962 (2001) 3, 4, 11
273 F.3d 991 (11th Cir.), cert. denied, 533 U.S. 979 (2001) 7
United States v. *Booker*, 125 S. Ct. 738 (2005) 3, 4, 7, 8
United States v. *Byers*, 740 F.2d 1104 (D.C. Cir. 1984) 12
United States v. *Cordoza-Estrada*, 385 F.3d 56 (1st Cir. 2004) 12
United States v. *Dockery*, No. 03-16388, 2005 WL 487735 (11th Cir. Mar. 3, 2005) 4, 5, 11
United States v. *Gaudin*, 515 U.S. 506 (1995) 8
United States v. *Henningsen*, 387 F.3d 585 (7th Cir. 2004), subsequent determination, 2005 WL 703934 (7th Cir. Mar. 29, 2005) 12
United States v. *Hughes*, 396 F.3d 374 (4th Cir.), on reh'g, 2005 WL 628224 (4th Cir. Mar. 16, 2005) 12
United States v. *Humphrey*, 287 F.3d 442 (6th Cir. 2002) 8
United States v. *Johnson*, 457 U.S. 537 (1982) 5, 6
United States v. *Keys*, 133 F.3d 1282 (9th Cir.), cert. denied, 525 U.S. 891 (1998) 8

Cases—Continued: Page

United States v. *Levy*:

379 F.3d 1241 (11th Cir.), reh'g denied, 391 F.3d 1327 (11th Cir. 2004), petition for cert. pending, No. 04-8942 (filed Mar. 1, 2005) 11

391 F.3d 1327 (11th Cir. 2004), petition for cert. pending, No. 04-8942 (filed Mar. 1, 2005) ... 11, 14

United States v. *Lovasco*, 431 U.S. 783 (1977) 5

United States v. *Miranda*, 248 F.3d 434 (5th Cir. 2001), cert. denied, 534 U.S. 980 (2001) and 1086 (2002) 9, 10, 12

United States v. *Nealy*, 232 F.3d 825 (11th Cir. 2000), cert. denied, 534 U.S. 1023 (2001) 3

United States v. *Outen*, 286 F.3d 622 (2d Cir. 2002) 8

United States v. *Perez-Covarrubias*, No. 92-30243, 1993 WL 5174 (9th Cir. Jan. 11, 1993) 12

United States v. *Pree*, 384 F.3d 378 (7th Cir. 2004) 12

United States v. *Rivera Pedin*, 861 F.2d 1522 (11th Cir. 1988) 10

United States v. *Quiroz*, 22 F.3d 489 (2d Cir. 1994) 9, 10

United States v. *Rogers*, 118 F.3d 466 (6th Cir. 1997) 12

United States v. *Washington*, 398 F.3d 306 (4th Cir. 2005) 8

United States v. *Wheat*, 278 F.3d 722 (8th Cir. 2001), cert. denied, 537 U.S. 850 (2002) 8

Youakim v. *Miller*, 425 U.S. 231 (1976) 5

Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 5

Constitution, statutes and rules: Page

U.S. Const.:
Amend. IV 5
Amend. VI 3, 4
18 U.S.C. 2 2
18 U.S.C. 924(c) 2
18 U.S.C. 924(*o*) 2
18 U.S.C. 1951(a) 2
Fed. R. App. P.:
Rule 2 ..... 10, 11
Rule 28(a)(9)(A) 9
Rule 47a 13

In the Supreme Court of the United States

No. 04-1094

CECILIO NUNEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL RESPONSE FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioner's motion for a new trial (Pet. App. 1-9) is unpublished, but the judgment is noted at 116 Fed. Appx. 252 (Table). The earlier opinion of the court of appeals affirming petitioner's conviction but remanding for an evidentiary hearing on his motion for a new trial (Pet. App. 10-33) is unpublished, but the judgment is noted at 82 Fed. Appx. 221 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2004. A petition for rehearing was denied on November 19, 2004. The petition for a writ of certiorari was filed on February 11, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a police officer for the City of Hialeah, Florida. Along with another police officer and a group of co-conspirators, petitioner engaged in a series of robberies of individuals and businesses.

2. Petitioner was convicted, following a jury trial, of conspiracy to commit robbery under the Hobbs Act, in violation of 18 U.S.C. 1951(a) (Count 2); conspiracy to use a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(*o*) (Count 3); two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2 (Counts 5 and 8); and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and 2 (Count 7). Pet. App. 2. The district court sentenced petitioner to imprisonment for a term of 188 months on Counts 2, 3, 5, and 8, *id.* at 40, 43, and a consecutive 84-month term of imprisonment on Count 7. *Id.* at 43.

On August 28, 2003, the court of appeals affirmed petitioner's conviction, but remanded for an evidentiary hearing on petitioner's motion for a new trial. Pet. App. 10-11. On August 26, 2004, the court of appeals affirmed the district court's denial of petitioner's motion for a new trial. *Id.* at 1-9. In his two appeals, petitioner raised a number of claims challenging his conviction and the district court's denial of his motion for a new trial. Petitioner did not, however, challenge the sentence the district court imposed. Nor did petitioner raise a Sixth Amendment challenge to his sentence in his petition for rehearing, which he filed on October 18, 2004, nearly four months after this Court's decision in *Blakely* v. *Washington*, 125 S. Ct. 2531 (2004).

3. In *United States* v. *Booker*, 125 S. Ct. 738 (2005), this Court held that the Sixth Amendment, as construed in *Blakely*, applies to the federal Sentencing Guidelines. *Id.* at 748-756 (Stevens, J., for the Court). In answering the remedial question in *Booker*, the Court applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for unreasonableness. *Id.* at 757-769 (Breyer, J., for the Court).

4. In the wake of *Booker*, a significant number of federal criminal defendants have sought review in this Court based on that decision (or *Blakely*). In most such cases, the government has suggested that the Court grant the petition, vacate the judgment, and remand for further consideration in light of *Booker*, leaving it to the court of appeals to apply doctrines such as plain error, harmless error, or waiver, as applicable. In *Senn* v. *United States*, 125 S. Ct. 1397 (2005) (No. 04-7175), the government took a different approach. The petition in *Senn* raised both a constitutional challenge to the composition of the court of appeals panel that decided that case and a claim that the Guidelines sentence imposed violated the rule announced in *Blakely*. In its brief in opposition, the government noted that the Eleventh Circuit had denied that petitioner's motion to file a supplemental brief that would have raised, for the first time, a *Blakely* challenge to his sentence. See Br. in Opp. at 28-29, *Senn*, *supra* (No. 04-7175). Because the Eleventh Circuit has held that arguments not raised in a party's opening brief are deemed abandoned, see, *e.g.*, *United States* v. *Ardley*, 242 F.3d 989, 990 (11th Cir.), cert. denied, 533 U.S. 962 (2001); *United States* v. *Nealy*, 232 F.3d 825, 830 (11th Cir. 2000), cert. denied, 534 U.S. 1023 (2001), and because there was no reason

to believe that the Eleventh Circuit would consider on the merits a *Booker* claim that the petitioner had not adequately preserved under that procedural bar rule, the government suggested that the petition be denied. Br. in Opp. at 28-29, *Senn*, *supra* (No. 04-7175). This Court nonetheless granted certiorari, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Booker*. See 125 S. Ct. 1397.

In light of this Court's disposition of *Senn*, the government stated in its memorandum filed in this case that it would be appropriate to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Booker*. See Mem. 1-2 (filed Mar. 3, 2005).

5. The day that the government filed its memorandum in this case, the Eleventh Circuit addressed the application to *Booker* claims of its rule that issues not raised in a party's opening brief will be deemed abandoned. See *United States* v. *Dockery*, No. 03-15388, 2005 WL 487735, at *1 (11th Cir. Mar. 3, 2005). In *Dockery*, the Eleventh Circuit held, in a case that this Court had remanded for reconsideration in light of *Booker*, that the defendant would be deemed to have abandoned his Sixth Amendment challenge to the Guidelines by failing to raise it in his opening brief. *Ibid.* The court of appeals stated that it saw nothing

> in the Supreme Court's remand order, which is cast in the usual language, requiring that we treat the case as though the * * * issue had been timely raised in this Court. In the absence of any requirement to the contrary in either [*Booker*] or in the order remanding this case to us, we apply our well-

> established rule that issues and contentions not timely raised in the briefs are deemed abandoned.

Ibid. (quoting *Ardley*, 242 F.3d at 990).

ARGUMENT

For the first time in any court, petitioner challenges the Eleventh Circuit's decision not to entertain *Booker* and *Blakely* claims that are not raised in a party's initial brief. Petitioner contends (Pet. 8-10) that the Eleventh Circuit's prudential rule contravenes the retroactivity principle of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), which, petitioner notes, this Court also invoked in *Schriro* v. *Summerlin*, 124 S. Ct. 2519, 2523 (2004) (citing *Griffith* in passing), and applied in *United States* v. *Johnson*, 457 U.S. 537, 545 n.9 (1982) (applying reasoning similar to *Griffith* to conclude that a decision by this Court construing the Fourth Amendment is to be applied retroactively to all convictions not yet final at the time the decision was rendered). Petitioner also contends (Pet. 15-23) that the Eleventh Circuit's position conflicts with decisions of "[t]he eleven other federal circuits." Pet. 18. This Court does not ordinarily review claims that were neither raised nor resolved below. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam). In any event, neither contention has merit. Further review is not warranted.[1]

---

[1] Because the court of appeals confirmed in *United States* v. *Dockery*, No. 03-16388, 2005 WL 487735, at *1 (11th Cir. Mar. 3, 2005), that a remand for further consideration in light of *Booker* does not alter the court of appeals' application of its longstanding rule that issues not raised in an appellant's opening brief are deemed abandoned, the government has concluded, notwithstanding the position taken in the

1. In *Griffith*, this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct review or not yet final." 479 U.S. at 328. Because the petitioner in *Griffith* had preserved the claim on which he sought review, the Court did not have occasion to consider the interplay between the retroactivity rule adopted in that case and principles of waiver, forfeiture, and other prudential doctrines. See *id.* at 317, 318; see also *Johnson*, 457 U.S. at 539-540 (noting that respondent's Fourth Amendment claim was raised before the district court and on appeal).

Application of procedural default rules is consonant with the retroactivity principle of *Griffith*. *Griffith* concluded that retroactive application of new rules on direct appeal was necessary both because of "the nature of judicial review" and in order to "treat[] similarly situated defendants the same." 479 U.S. at 322-323. That rationale is in no way inconsistent with application of procedural default rules to bar consideration of claims that have not been adequately preserved. Defendants who have not preserved a claim of error are not "similarly situated" (*id.* at 323) to those who have. Cf. *Shea* v. *Louisiana*, 470 U.S. 51, 59-60 (1985) (holding that it is not inequitable to draw a distinction between a defendant who raises a claim on collateral attack and one who raises it on direct review because "[t]he one litigant already has taken his case through the primary system" and "[t]he other has not"). Application of procedural bar rules does not offend principles requiring the retro-

---

memorandum filed in this case, see Mem. 1-2, that it is unnecessary for this Court to remand this case for reconsideration in light of *Booker*.

active application of new constitutional rules to cases open on direct review.

> Retroactivity doctrine answers the question of which cases a new decision applies to, assuming that the issue involving that new decision has been timely raised and preserved. Procedural bar doctrine answers the question of whether an issue was timely raised and preserved, and if not, whether it should be decided anyway. It makes no more sense to say that a procedural bar should not be applied in this situation because doing so undermines or frustrates retroactive application of a Supreme Court decision, than it does to say that procedural bars should not be applied in any situation because doing so undermines or frustrates the constitutional doctrines and commands underlying the issue that is held to be defaulted.

United States v. *Ardley*, 273 F.3d 991, 992 (11th Cir.) (Carnes, J., concurring in denial of rehearing en banc), cert. denied, 533 U.S. 962 (2001).

On several occasions, this Court has indicated that the retroactivity principle embodied in *Griffith* is in no way inconsistent with the application of procedural default rules. In *Shea* v. *Louisiana*, *supra*, for example, the Court held that the rule announced in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), would be applied retroactively to cases pending on direct review. 470 U.S. at 59. In doing so, the Court explicitly noted that the retroactive application of *Edwards* was "subject, of course, to established principles of waiver, harmless error, and the like." *Id.* at 58 n.4. Similarly, in *Booker* itself, the Court stated that while courts were bound to apply its holding "to all cases on direct review," 125 S. Ct. at 769

(citing *Griffith*, 479 U.S. at 328), "we expect reviewing courts to apply ordinary prudential doctrines," including, specifically, the plain error doctrine for claims that have not been preserved, *ibid.* See also *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (noting that rule of *United States* v. *Gaudin*, 515 U.S. 506 (1995), applied retroactively under *Griffith*, but unpreserved claims were subject to review only for plain error); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 104 n.1 (1993) (Scalia, J., concurring) (noting, as the Court extended the holding of *Griffith* to civil cases, that "a party may procedurally default on a claim in either [the civil or criminal] context").[2] This Court has never suggested the contrary.[3]

---

[2] Accord, *e.g.*, *United States* v. *Humphrey*, 287 F.3d 422, 442 (6th Cir. 2002) (noting that although *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), applies retroactively to cases on direct review under *Griffith*, unpreserved claims were subject to plain error review); *United States* v. *Outen*, 286 F.3d 622, 634 (2d Cir. 2002) (same); *United States* v. *Wheat*, 278 F.3d 722, 739 (8th Cir. 2001) (same), cert. denied, 537 U.S. 850 (2002); *United States* v. *Keys*, 133 F.3d 1282, 1285-1286 (9th Cir.) (en banc) (holding that although rule of *Gaudin* applied retroactively to cases on direct review under *Griffith*, unpreserved claims were subject to review only for plain error), cert. denied, 525 U.S. 891 (1998).

[3] The Fourth Circuit recently stated in a footnote, and without briefing or argument by the parties on the issue, that "[a]lthough appellate contentions not raised in an opening brief are normally deemed to have been waived, the *Booker* principles apply in this proceeding because the Court specifically mandated that we 'must apply [*Booker*] . . . to all cases on direct review.'" *United States* v. *Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005) (citation omitted; brackets in original) (quoting *Booker*, 125 S. Ct. at 769 (Breyer, J., for the Court)). The government was unable to seek rehearing in that case because the court of appeals, after the time for filing a petition for rehearing had expired, denied the timely filed joint motion of the parties for an extension of time in which to file a rehearing petition.

2. Petitioner also contends (Pet. 16-23) that the Eleventh Circuit's application of its procedural bar rule conflicts with the law of every other court of appeals, and that Supreme Court review is necessary to resolve the circuit conflict.

a. The Federal Rules of Appellate Procedure provide that an appellant's brief "must contain * * * appellant's contentions and the reasons for them." Fed. R. App. P. 28(a)(9)(A). The courts of appeals have without exception interpreted that provision to establish a general prudential rule that "[a]n appellant waives any issue which it does not adequately raise in its initial brief." *Playboy Enters.* v. *Public Serv. Comm'n*, 906 F.2d 25, 40 (1st Cir.), cert. denied, 498 U.S. 959 (1990).[4]

The Fourth Circuit should be given an opportunity to reconsider that erroneous conclusion in an appropriate case.

[4] Accord, *e.g.*, *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) ("It is well established that an argument not raised on appeal is deemed abandoned, and we will not ordinarily consider such an argument unless manifest injustice otherwise would result.") (internal citations and quotation marks omitted); *Ghana* v. *Holland*, 226 F.3d 175, 180 (3d Cir. 2000) ("It is well settled that if an appellant fails to comply with these [Rule 28] requirements on a particular issue, he normally has abandoned and waived that issue on appeal.") (quoting *Kost* v. *Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993)) (alterations omitted); *Shopco Distrib. Co.* v. *Commanding Gen. of Marine Corps Base*, 885 F.2d 167, 170 n.3 (4th Cir. 1989) (holding that any claim not raised in a party's initial brief will be deemed waived) (collecting authorities); *United States* v. *Miranda*, 248 F.3d 434, 443 (5th Cir. 2001) ("Failure to satisfy the requirements of Rule 28 as to a particular issue ordinarily constitutes abandonment of the issue."), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *Bickel* v. *Korean Air Lines Co.*, 96 F.3d 151, 153 (6th Cir. 1996) ("We normally decline to consider issues not raised in the appellant's opening brief.") (quoting *Priddy* v. *Edelman*, 883 F.2d 438, 446 (6th Cir. 1989)), cert. denied, 519 U.S. 1093 (1997); *Holman* v. *Indiana*, 211 F.3d 399, 406 (7th Cir.) (finding

The courts of appeals have recognized that that rule is not jurisdictional, and therefore that courts have authority, in the exercise of their discretion, to address issues not timely raised by the parties. See, *e.g.*, *United States* v. *Miranda*, 248 F.3d 434, 443-444 (5th Cir. 2001) (noting that "the issues-not-briefed-are-waived rule is a prudential construct that requires the exercise of discretion" and that the court may consider an issue that was not timely raised "where substantial public interests are involved"), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) (court will review issue not raised in the brief where manifest injustice would otherwise result); *Leer* v. *Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) (same). See also Fed. R. App. P. 2 (granting courts discretion to suspend most rules for "good cause"). The Eleventh Circuit specifically has recognized that it has the authority to relieve litigants of the consequences of default and address an issue on the merits where manifest injustice would otherwise result.[5] In the exercise of

---

arguments not raised in initial brief waived), cert. denied, 531 U.S. 880 (2000); *Sweat* v. *City of Ft. Smith*, 265 F.3d 692, 696 (8th Cir. 2001) ("[C]laims not raised in an initial appeal brief are waived."); *Greenwood* v. *FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief."); *Adams-Arapahoe Joint Sch. Dist. No. 28-J* v. *Continental Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989) (holding that "[a]n issue not included in either the docketing statement or the statement of issues in the party's initial brief is waived on appeal"); *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 319-320 (D.C. Cir. 1985) (deeming an issue waived where a party did not raise it until supplemental briefing).

[5] See, *e.g.*, *United States* v. *Rivera Pedin*, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988) (pursuant to Rule 2 of the Federal Rules of Appellate Procedure, considering an issue raised only in co-defendant's brief, despite defendant's failure to adopt by reference his co-defendant's

its discretion, however, the Eleventh Circuit has declined to exempt *Booker* and *Blakely* claims from the operation of its longstanding rule that it will not consider claims unless they were timely raised in the appellant's opening brief. See, *e.g.*, *Dockery*, 2005 WL 487735, at *1 (involving *Booker* claims); *United States* v. *Levy*, 379 F.3d 1241, 1243 n.3 (11th Cir.) ("[W]e conclude that 'there would be no miscarriage of justice if we decline to address' *Blakely*-type issues not raised in opening briefs on appeal.") (quoting *McGinnis* v. *Ingram Equip. Co.*, 918 F.2d 1491, 1496 (11th Cir. 1990) (en banc)), reh'g denied, 391 F.3d 1327 (11th Cir. 2004), petition for cert. pending, No. 04-8942 (filed Mar. 1, 2005); see also *United States* v. *Ardley*, 242 F.3d 989, 990 (11th Cir.) (declining to exempt claims under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), from operation of rule), cert. denied, 533 U.S. 962 (2001).

Petitioner asserts (Pet. 16) that the Eleventh Circuit's application of the procedural bar rule "directly contradicts every other Circuit" because other courts have entertained on the merits challenges based on intervening decisions of this Court in *Booker*, *Blakely*, and *Apprendi*, even if they were not raised in the defendant's opening brief. See Pet. 16-23 & n.4. Of the numerous federal cases petitioner cites, only *two* explicitly considered whether to apply the ordinary prudential rule that issues not raised in an opening brief would not

---

arguments); *Gramegna* v. *Johnson*, 846 F.2d 675 (11th Cir. 1988) (vacating judgment based on issue raised sua sponte by the court, pursuant to Rule 2); see also *United States* v. *Levy*, 391 F.3d 1327, 1335 (11th Cir. 2004) (Hull, J., concurring in denial of rehearing en banc) ("The issue is not whether this Court has the power to consider issues not raised in the initial brief; of course it does."), petition for cert. pending, No. 04-8942 (filed Mar. 1, 2005).

be considered.[6] *Miranda*, 248 F.3d at 443-444 (cited at Pet. 17) (discussing *Apprendi* claim); *United States* v. *Byers*, 740 F.2d 1104, 1115 n.11 (D.C. Cir. 1984) (cited at Pet. 20). In both cases, the courts may have exercised discretion to proceed to the merits of the argument the defendant had raised only because the court concluded it clearly lacked merit. See *Miranda*, 248 F.3d at 446; *Byers*, 740 F.2d at 1118 ("obvious" that conditions necessary for relief not met); *id.* at 1121 (noting claim has been "uniformly rejected by other circuits"). Thus, it appears that most courts that have addressed claims in this posture have not explicitly declined to apply the default rule, and thus those decisions cannot be said to "conflict" with the decision below.

b. Even if other courts of appeals *had* explicitly declined to apply the usual procedural bar rule to claims based on intervening decisions of this Court in *Booker*

---

[6] In addition, four other opinions petitioner cites (Pet. 17-18 & n.4) stated, without discussing the rule that claims must be raised in a party's opening brief, that it was appropriate to consider the claims in that posture because this Court had recently clarified the law. See *United States* v. *Ameline*, 376 F.3d 967 (9th Cir. 2004), on reh'g, 400 F.3d 646 (9th Cir.), reh'g en banc granted, 2005 WL 612710 (9th Cir. Mar. 11, 2005); *United States* v. *Henningsen*, 387 F.3d 585, 591 (7th Cir. 2004), subsequent determination, 2005 WL 703934 (7th Cir. Mar. 29, 2005); *United States* v. *Cordoza-Estrada*, 385 F.3d 56, 59 (1st Cir. 2004); *United States* v. *Pree*, 384 F.3d 378, 396 (7th Cir. 2004). In *United States* v. *Perez-Covarrubias*, No. 92-30243, 1993 WL 5174, at *1 n.1 (9th Cir. Jan. 11, 1993) (cited at Pet. 23), the *government* conceded error in its opening brief, which was sufficient to preserve the claim. *United States* v. *Rogers*, 118 F.3d 466, 471 (6th Cir. 1997), and *United States* v. *Hughes*, 396 F.3d 374, 380-381 & n.8 (4th Cir.), on reh'g, 2005 WL 628224 (4th Cir. Mar. 16, 2005), cited by petitioner (Pet. 16-18), discussed only the implications of the defendants' failure to raise the claim before the district court, rather than their failure to raise *Blakely*-type claims in their initial briefs before the court of appeals.

and *Blakely*, further review would not be warranted. Rules governing the consideration of unpreserved claims may appropriately be viewed as local rules that can differ from circuit to circuit. So long as such local rules are reasonable, see *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Fed. R. App. P. 47(a), there is no requirement of "uniformity among the circuits in their approach to [such] rules." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993). Indeed, this Court specifically has acknowledged the power of courts of appeals to adopt rules restricting the consideration of issues not raised in a timely manner. In *Thomas* v. *Arn*, *supra*, this Court held that the Sixth Circuit had not abused its discretion by promulgating a rule that a party waived the right to appellate review of a district court judgment that adopted a magistrate's recommendation when the party had failed to file objections with the district court identifying those issues on which review was desired. The Sixth Circuit's "nonjurisdictional waiver provision," like the rule at issue here, would ordinarily "preclud[e] appellate review of any issue" not raised in the manner prescribed, although the court of appeals could "excuse the default in the interests of justice." *Thomas*, 474 U.S. at 147-148, 155. Noting that such a rule was supported by sound considerations of judicial economy, *id.* at 148, this Court concluded that the courts of appeals had authority to adopt "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *Id.* at 146-147 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)).

Procedural bar rules of the sort at issue here promote efficiency by avoiding piecemeal briefing of appeals and ensuring that the appellee has the opportunity to respond to all issues raised by the appellant without supplemental briefing. Such rules are especially important because of the courts of appeals' increasingly heavy caseloads. Petitioner contends (Pet. 11 n.2, 24) that the court of appeals' rule should be rejected because it would give litigants an incentive to raise numerous claims that were precluded by existing precedent. Although the same could be said of any procedural default rule that attaches consequences to the failure to raise a claim, this Court rejected the position that the futility of raising a claim under existing law wholly excuses a litigant from preserving it. See, *e.g.*, *Johnson*, 520 U.S. at 467-468 (reviewing unpreserved claim only for plain error although the argument was foreclosed by "near-uniform precedent both from this Court and from the Courts of Appeals"); see also *Levy*, 391 F.3d at 1332 (Hull, concurring in the denial of rehearing en banc) ("If defendants were going to raise a long and useless laundry list of objections, they already would have been doing exactly that in the district court so objections could receive full *de novo* review [on appeal], rather than plain-error review."), petition for cert. pending, No. 04-8942 (filed Mar. 1, 2005); *id.* at 1333 (noting that "numerous defendants" had properly preserved their claims by "rais[ing] *Apprendi*-type arguments in their challenges to enhancements under the federal Sentencing Guidelines") (collecting cases).

This Court has denied review in a number of cases in which the Eleventh Circuit declined to entertain a claim under the intervening decisions in *Blakely* or *Apprendi* solely because it was not raised in the petitioner's open-

ing brief, see, *e.g.*, *Ardley* v. *United States*, 535 U.S. 979 (2002) (No. 01-8714); *Nealy* v. *United States*, 534 U.S. 1023 (2001) (No. 01-5152); *Padilla-Reyes* v. *United States*, 534 U.S. 913 (2001) (No. 01-5284), and denied review in several cases that specifically challenged application of the procedural bar rule in that context, see, *e.g.*, *Phillips* v. *United States*, 536 U.S. 961 (2002) (No. 01-5718) (denying review when petitioner challenged application of rule to bar consideration of *Apprendi* claim); *Garcia* v. *United States*, 534 U.S. 823 (2001) (No. 00-1866) (denying review when Eleventh Circuit declined, on remand from this Court for reconsideration in light of *Apprendi*, to consider claim because it was not raised in initial brief); see also *Thompson* v. *United States*, 535 U.S. 1114 (2002) (No. 01-8603) (challenging application of rule to bar consideration of ex post facto claim). There is no reason for a different result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

ELIZABETH A. OLSON
Attorney

APRIL 2005